tion had been issued. In fact, as in this instant case, according to the evidence of the respondent, 'the CF is not given to me till today' (ie the date of hearing of the case on 18 September 1986). Yet, there was connection of water and electricity on 20 February 1986. It is clear that the certificate of fitness is not a sine qua non for connection of water and electricity, though normally the water and electricity will only be connected after the issuance of the certificate of fitness for occupation.

Looking at the evidence, 20 February 1986 is the date on which the water and electricity supplies were connected to the house, and in the view of this court, this is the date of 'delivery of vacant possession', if one reads the terms in the third schedule under cl 4(1) of schedule E, item 3.

The appellants' witness in the court below had admitted that when the appellants called the respondent to hand over the keys on 20 September 1984, there was only what they themselves called 'practical completion' of the house. They did not even dare to use the phrase 'vacant possession'.

The 24 months for delivery of vacant possession of the house under the Housing Developers (Control and Licensing) Act 1966, from the date (30 July 1982) of execution of sale and purchase agreement should expire on 29 July 1984, and in view of the finding of this court that the date of delivery of vacant possession in this case was 20 February 1986, damages shall be calculated for the period 29 July 1984 to 20 February 1986, that is 569 days, at 10% of $48,000 which will work out to $7,482.74 with interest at 8% pa on this sum from 20 February 1986 till date of satisfaction.

The appeal is therefore dismissed with costs.

Order accordingly.

Solicitors: *Abdul Raman Saad & Associates*; *SK Lingam & Co.*

Reported by *PS Ranjan*

Koh Siak Poo v Perkayuan OKS Sdn Bhd

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C23-308-86
ZAKARIA YATIM J
29 APRIL 1988

Civil Procedure – Summary judgment – Application for – Whether plaintiff's claim based on agreement secured by fraudulent misrepresentation – Whether triable issues raised – Merits of application – Rules of the High Court 1980, O 14

The plaintiff was a logging contractor and the first and second defendants were limited companies. The third, fourth and fifth defendants were directors and guarantors of the first and second defendant companies. By a deed made between the plaintiff and the first and second defendant companies, in consideration of the plaintiff agreeing to forbear from further pursuing certain civil actions against them, the first and second defendant companies agreed to pay the plaintiff a sum of $3m. A cash payment of $50,000 was made but subsequent cheque payments were dishonoured. The plaintiff proceeded to apply for a summary judgment under O 14 of the Rules of the High Court 1980 against the defendants, contending that the defendants had wilfully failed and neglected to pay the plaintiff the said sum. The defendants denied wilful failure or neglect and contended that the agreement was secured by fraudulent misrepresentation.

Held, dismissing the application: This is not a proper case where summary judgment under O 14 should be granted. The defendants have an arguable case or have raised triable issues in their defence.

Cases referred to

1 *Citibank NA* v *Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (refd)
2 *Tan Chong & Sons Motor Co Ltd* v *Yang Chin Lang* [1967] 1 MLJ 123 (refd)

Legislation referred to

Evidence Act 1950 s 92 provisos (b) & (f)
Rules of the High Court 1980 O 14

Mahinder Singh Dulku for the plaintiff.
Dominic Puthucheary for the defendants.

Cur Adv Vult

Zakaria Yatim J: This is an application by the plaintiff for an order, under O 14 of the Rules of the High Court 1980, that the plaintiff be at liberty to sign final judgment in this action against the defendants for the amount endorsed in the writ, that is, $2,950,000 and interest at the rate of 14% pa on the sum claimed from 22 August 1985 until judgment and thereafter at the rate of 8% pa until payment or satisfaction. The applicant also asks for costs.

The plaintiff in his statement of claim averred as follows: At all material times, he was a logging contractor and resided at no 223, Jalan Bakar Sampah, Pekan Lama, Sungei Petani, Kedah. The first and second defendants were limited companies incorporated in the states of Malaya and had their principal offices at Leong Moh Building, 6¾ miles, Kepong, Kuala Lumpur. The third, fourth and fifth defendants were the directors of the first and second defendant companies and were guarantors of the first and second defendant companies. On 9 July 1984, the plaintiff commenced an action against the first defendant company in the High Court, Kuala Lumpur, vide civil suit no 2183 of 1984, for specific performance of an agreement dated 16 October 1982, for an interlocutory injunction and for damages for breach of contract. On the same date VC George J granted the interlocutory injunction ex parte. At a subse-

quent date the learned judge dismissed the first defendant's application to set aside the injunction. On 21 August 1984 the plaintiff also commenced an action against the second defendant, vide civil suit no 2906 of 1984, for various reliefs mentioned therein. By a deed dated 3 April 1985 (the said deed) and made between the plaintiff and the first and second defendant companies, in consideration of the plaintiff agreeing, inter alia, to forbear from further prosecuting the said civil actions and would discontinue the same, the first and second defendant companies jointly and severally agreed to pay to the plaintiff a sum of $3,000,000. The plaintiff would rely on the full terms and conditions of the said deed at the trial of this action. The plaintiff accordingly did forbear further to prosecute the said actions and on 15 April 1985 discontinued the same. By an agreement in writing dated 3 April 1985, the third, fourth and fifth defendants jointly and severally guaranteed the observance and performance of the terms and conditions of the said deed by the first and second defendant companies and the payment of the sum of $3,000,000. In payment of the sum mentioned in the said deed the third defendant gave the plaintiff a cash cheque for $50,000 and another cheque dated 4 April 1985 for a sum of $200,000. The third defendant requested the plaintiff not to present the cheque for $200,000 for payment until 29 April 1985. The plaintiff agreed to the said request. The cash cheque for $50,000 was honoured when duly presented for payment but the cheque for $200,000 was returned dishonoured with the remarks 'exceed arrangements' when duly presented for payment on the agreed date. Due notice of dishonour was given to the first and second defendant companies. The plaintiff alleged that the first and second defendant companies wilfully failed and neglected to pay to the plaintiff the balance of the sum mentioned in the deed. The plaintiff, through his solicitors, gave notice dated 22 July 1985 to all the defendants and demanded the payment of the balance sum of $2,950,000. The plaintiff said the defendants had wilfully failed and neglected to pay the plaintiff the said sum. The plaintiff's claim against the defendants is the same as in the application for summary judgment.

The defendants in their statements of defence averred as follows: The third, fourth and fifth defendants denied that they were unqualified guarantors and stated that the guarantee given was subject to full and honest disclosure of the audited accounts alleged to have been expended by the plaintiff on the concession. The third, fourth and fifth defendants contended that the release of the third defendant by the plaintiff by an agreement dated 8 April 1985, released the fourth and fifth defendants from the said guarantee. The first, second, fourth and fifth defendants stated that they had declined to pay because they had, subsequent to the agreement, discovered that the plaintiff had fraudulently misrepresented to the first, second, fourth and fifth defendants the actual amount expended by the plaintiff on the concession, and further the plaintiff did not produce any evidence on audited accounts to show to the first, second, fourth and fifth defendants that the representation made to them that a sum of $3,000,000 had been expended was an honest representation. The first, second, fourth and fifth defendants further contended that the plaintiff entered into the agreement referred to in the statement of claim, and misrepresented that he had expended a sum of $3,000,000 to mislead and appease his partners and that the said agreement was not intended to be a genuine agreement. The said defendants denied wilful failure or neglect and stated that they, having discovered that the agreement was secured by fraudulent misrepresentation, refused to make any payment to the plaintiff. The said defendants further contended that the plaintiff had undertaken to produce evidence in the form of audited accounts that a sum of $3,000,000 was expended and that the plaintiff had failed to do so. The third defendant in his separate statement of defence contained a similar defence as that of the other defendants. His main defence was that of fraudulent misrepresentation by the plaintiff in respect of the sum of money claimed by the plaintiff. He also contended that the plaintiff entered into the deed dated 3 April 1985 by fraudulently misrepresenting that the plaintiff had expended the sum of $3,000,000 to mislead his partners and was not intended to be a genuine agreement. The third defendant, having discovered that the agreement was secured by fraudulent misrepresentation, refused to make any payment to the plaintiff.

Counsel for the plaintiff, Mr Mahinder Singh Dulku, in his written submission, stated that the statements of defence filed by the defendants were a sham defence and incapable of resisting the plaintiff's application for summary judgment. He added that the plaintiff's application was based upon clear and unequivocal contractual provisions. He submitted that the plaintiff's application disclosed a clear case and that the plaintiff was entitled to summary judgment under O 14. I agree with him that where all the issues are clear and the matter of substance can be decided once and for all without going to trial, there is no reason why the court should not deal with the whole matter under the procedure laid down in O 14: see *Citibank NA* v *Ooi Boon Leong & Ors.*[1]

The question for the court to consider is whether in the instant case the plaintiff's case is plain and clear and entitles him to summary judgment and whether the defence is a sham defence; or whether the defence has raised an arguable case or triable issues. If the defence raises an arguable case or triable issues then the matter should go for trial.

The third defendant in his affidavit affirmed 20 May 1986 stated that the first and second defendants had a

good defence to the plaintiff's claim. He averred that the first and second defendant companies denied that the plaintiff had the right to claim the sum as stated in the statement of claim as the plaintiff had fraudulently misrepresented to them the actual amount expended by the plaintiff on the concession and added that the plaintiff did not produce any evidence on audited accounts to show to the defendants that the representation made to them that the sum of $3,000,000 had been expended was an honest representation. The third defendant further stated in his affidavit that the first and second defendant companies were not liable to pay such payments because they discovered that the agreement was secured by the said misrepresentation.

Mr Dominic Puthucheary, counsel for the defendants, stated in his written submission, that the sum of $3,000,000 'speaks for itself in that *it must have a legitimate basis*' (emphasis mine). According to him the defendants had no obligation to give such a large amount without any justification or cause. He further submitted that there was a contemporaneous oral agreement that the payment for recession of the agreement would be the actual money spent by the plaintiff in preparation for the logging concession. He added that while the deed was silent on the oral agreement between the plaintiff and the defendants, the deed was intended to restitute the plaintiff for moneys actually expended. It did not preclude the defendants from explaining, by evidence, the agreement which was made contemporaneously, and it was not inconsistent with the deed that the sum stated in the agreement must be provable by an audited account or other documentary proof.

In my opinion Mr Puthucheary's argument is not without merit. In *Tan Chong Motors Co Ltd* v *Yang Chin Lang*,[2] it was held that when there was a contemporaneous or prior separate oral agreement as to a matter on which a document was silent, proof of it might be given when such agreement was not inconsistent with or did not contradict the terms of the document and the evidence was admissible under provisos (b) and (f) to s 92 of the Evidence Act. Gill J, in his judgment in that case, said:

> It was contended on behalf of the defendant that the evidence of the plaintiffs' witnesses with regard to their threat to cancel the agency and to sue was inadmissible, as no evidence could be given to add to, contradict or vary the contents of the letter of guarantee. In my opinion, this evidence was admissible because, as was stated by Lord Lyndhurst LC in *Clifford* v *Turrell* (1845) 14 LJ Ch 390, 'the settled rule of law is, that you may prove a further consideration which is consistent with the consideration stated on the face of the deed. You cannot be allowed to prove a consideration inconsistent with it, but you may prove another which stands with it.' That case was approved by the Judicial Committee of the Privy Council in *Frith* v *Frith* [1906] AC 254. In *Turner* v *Forwood* [1951] 1 All ER 746, it was held that where the consideration is stated in a deed, parol evidence to prove a larger consideration does not contradict the deed and is admissible. In my opinion, the evidence was admissible under provisos (b) and (f) to s 92 of the Evidence Ordinance 1950. Quite clearly when there is a contemporaneous or prior separate oral agreement as to a matter on which a document is silent, proof of it may be given when such agreement is not inconsistent with or does not contradict the terms of the document.

Chitty on Contracts, 25th Ed, Vol 1, para 803 states:

> The existence of the parol evidence rule does not, however, mean that it is never permissible to inquire beyond the language of the instrument. In order to enable a term of the contract to be interpreted or construed, the court is entitled (and, indeed, bound) to see what the circumstances were with reference to which the words were used, and the object appearing from those circumstances which the person using them had in view. The court must place itself in thought in the same 'factual matrix' as that in which the parties were. But the parol evidence rule also restricts the admissibility of extrinsic evidence to show what the maker or makers of the instrument intended by the words used: 'evidence of ... the parties' intentions ... ought not be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.

On fraudulent misrepresentation, Mr Puthucheary submitted that if the plaintiff had a legitimate claim, it would be easy enough to produce documentary evidence. He said that the plaintiff had failed to produce such evidence in any of the affidavits. In my opinion this question can only be decided at the trial.

For the reasons stated above, this is not a proper case where summary judgment under O 14 should be granted. The defendants have an arguable case or have raised triable issues in their defence. The defence is not a sham as alleged by the plaintiff. In the circumstances the plaintiff's application for summary judgment under O 14 of the Rules of the High Court is dismissed with costs.

Application dismissed.

Solicitors: *Mahinder Singh Dulku & Co*; *Skrine & Co.*

Reported by *Ng Sheau Jiuan*